IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ICONTROL NETWORKS, INC., a Delaware corporation, Plaintiff, v. ZONOFF, INC., a Delaware corporation, Defendant.	)	CASE NO.: 1:14-cv-01199-GMS **JURY TRIAL DEMANDED**

ICONTROL'S OPPOSITION TO ZONOFF'S MOTION TO DISMISS AND FOR A MORE DEFINITE STATEMENT

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I. INTRODUCTION

Plaintiff Icontrol Networks, Inc. ("Icontrol"), by and through its attorneys, respectfully submits this Opposition to Defendant Zonoff, Inc.'s ("Zonoff") Motion to Dismiss Plaintiff's First Amended Complaint ("FAC") and for a More Definite Statement ("Motion").[1] The Motion misstates and misapplies the law with respect to indirect infringement, and patent damages. The Motion further improperly requests the Court to construe every method claim of every asserted patent to require joint infringement by multiple parties. This request is premature and also violates the patent law.

Moreover, the Court should deny Zonoff's motion for a more definite statement because the motion is not the appropriate vehicle to obtain Icontrol's identification of asserted claims. This Court has established procedures for identifying and narrowing asserted claims early in litigation through a combination of technical document production by a defendant and service of infringement contentions by a plaintiff. There is nothing unusual about the number of patents (or amount of claims in the patents) in the FAC. There is no justification for deviating from this Court's procedures for the identification of asserted claims. Icontrol believes that both parties should follow the Court's recommended procedures. Zonoff, however, has steadfastly refused to follow those procedures. Despite numerous requests, Zonoff has refused to participate in a Rule 26 conference regarding discovery and has refused to produce its core technical documents under this Court's Default Standard for Discovery Including Electronically Stored Information ("ESI") ("Default Standards"). If it had followed this Court's procedures, Icontrol would have worked diligently to provide its identification asserted claims. It is disingenuous for Zonoff to refuse to

[1] All references to Zonoff's Motion refer to the Memorandum of Points and Authorities filed at D.I. 19.

participate in the Court's structured methods to reduce the number of patent claims at issue and then complain that the number of claims at issue is too numerous. Zonoff's gamesmanship should not be rewarded. The motion for more definite statement should be denied.

II. NATURE AND STAGE OF THE PROCEEDINGS

A. Procedural History of this Action.

Icontrol brought this Action on September 16, 2014, against its competitor, Zonoff, after analyzing Zonoff's competing products and reviewing Zonoff's public statements. Icontrol's Original Complaint alleged that Zonoff directly and indirectly infringes six Icontrol patents: United States Patent Nos. 6,624,750 ("the '750 patent"), 7,262,690 ("the '690 patent"), 8,335,842 ("the '842 patent"), 8,612,591 ("the '591 patent"), 8,478,871 ("the '871 patent"), and 8,638,211 ("the '211 patent") (collectively, the "Asserted Patents"). D.I. 1 (Original Complaint). Zonoff responded by moving to dismiss Icontrol's claims, strike Icontrol's damages theories, or for a more definite statement. D.I. 11. Believing its Original Complaint to be sufficient, but hoping to resolve the dispute without burdening the Court with motion practice, Icontrol filed a First Amended Complaint on November 18, 2014, identifying the same Asserted Patents and the same accused products, but pleading additional facts regarding Icontrol's infringement claims. See D.I. 15. at ¶¶13-22, 26-28, 34-36, 42-44, 50-52, 58-60, and 66-68. Notwithstanding this FAC, Zonoff filed a second, near identical, motion to dismiss, strike, or for a more definite statement on December 2, 2014. *See* D.I. 18.

B. Zonoff's Refusal to Produce Core Technical Documents.

Icontrol served its Identification of Accused Products and Asserted Patents pursuant to Paragraph 4 of the Court's Default Standards on November 7, 2014. Exhibit A. Under the Default Standard for Discovery, Zonoff was required to produce its core technical documents by December 8, 2014, and Icontrol would have then served its infringement contentions identifying specific asserted claims by January 7. Zonoff, however, declined to produce its core technical documents, preventing Icontrol from preparing its infringement contentions. Exhibit B.

III. SUMMARY OF THE ARGUMENTS

The FAC meets and exceeds the applicable pleading standards. Moreover, the Motion misstates and misapplies the appropriate legal standards:

1. The FAC alleges facts sufficient to plausibly show (a) Zonoff's knowledge of each Asserted Patent and (b) its specific intent to directly infringe, contributorily infringe, and induce others to infringe each Asserted Patent.

2. Icontrol is not required to plead the elements of "joint infringement," as Zonoff claims. Whether any particular method claim requires joint infringement is a claim construction issue best left to the Court's *Markman* proceedings. Further, Zonoff failed to support its argument with any evidence in the FAC or the Asserted Patents, asking the Court to improperly draw an adverse inference against the FAC and non-movant Icontrol.

3. Zonoff's request to strike Icontrol's *entire* damages claim is legally improper. By statute, upon a finding of infringement, Icontrol is entitled to damages "in no event less than a reasonable royalty." Zonoff's argument that the FAC does not plead compliance with the marking statute fails because no such affirmative duty exists.

4. Zonoff's request for a more definite statement should be denied. Icontrol is not required to plead the infringement of any particular claim of any Asserted Patent at this stage. Indeed, this Court has established clear procedures in which Icontrol must identify the claims it believes are infringed after receiving Zonoff's core technical documents, and Zonoff's request violates those procedures by seeking to require Icontrol to specify which claims it contends are infringed before receiving Zonoff's core technical documents. Moreover, Zonoff itself has delayed the disclosure of asserted claims, having refused to produce its core technical

documents, which would enable Icontrol to swiftly identify the asserted claims and provide infringement contentions.

For these reasons, discussed more fully below, Icontrol requests that the Court deny Zonoff's Motion.

IV. STATEMENT OF RELEVANT FACTS

A. Zonoff's Knowledge of the Asserted Patents

In addition to the allegations in Icontrol's original complaint, the FAC adds further facts. For example, in the FAC Icontrol alleges that Zonoff obtained knowledge of the Asserted Patents, or willfully blinded itself to their existence, in several ways:[2]

- Zonoff's own patent applications cite at least one Asserted Patent. FAC at ¶ 19.
- On its website, Zonoff identifies Icontrol as a major competitor, leading it to research Icontrol's patent portfolio. Exhibit C; FAC at ¶¶ 14-15; *see also id.* at ¶¶ 20-21.
- Zonoff visited the Icontrol website that displays the Asserted Patents. *Id.* at ¶ 16.
- Zonoff monitored Icontrol's patent litigation filings. *Id.* at ¶ 17.
- Zonoff monitored Icontrol's press releases identifying Zonoff's purchase of certain Asserted Patents. *Id.* at ¶ 18.
- There is widespread industry knowledge of certain of the Asserted Patents by virtue of their having been referenced in over 190 patents and patent applications. *Id.*
- Zonoff read certain industry publications referencing Icontrol's ownership of certain Asserted Patents. *Id.* at ¶¶ 20-21.

[2] Although Icontrol adequately pleads that Zonoff possessed pre-suit knowledge of the patents, Icontrol also pled in the FAC that Zonoff had knowledge of the patents no later than the filing of the Original Complaint in this Action. FAC at ¶13.

B. The FAC Pleads Substantial Facts For Direct, Inducement, and Contributory Infringement.

As Zonoff's Motion indicates, the FAC clarifies Icontrol's claims for direct, inducement, and contributory infringement. For each Asserted Patent, the FAC includes language indicating at least one claim that Icontrol believes is directly infringed. FAC at ¶¶ 25, 33, 41, 49, 57 and 65.

The FAC also pleads facts related to Zonoff's inducement of third party direct infringers (including retailers such as Staples, service providers, consumer electronics OEMs, and system integrators) by, among other things, advertising the infringing products and their infringing use; establishing distribution channels for these infringing products in the United States; drafting, distributing or making available datasheets, instructions, or manuals for the Accused Products to Zonoff's customers and prospective customers; and/or providing technical support or other services for the Accused Products to Zonoff's customers and prospective customers. FAC at ¶¶ 26, 34, 42, 50, 58, and 66 . The FAC also pleads that Zonoff took these actions in full knowledge of each Asserted Patent and did so with the specific intent to induce one or more third parties to infringe each Asserted Patent. *Id.*

The FAC further pleads facts related to Zonoff's contributory infringement of third party direct infringers. The FAC alleges that Zonoff sells components that are material to each Asserted Patent to third parties who directly infringe each Asserted Patent by making, using, or selling product incorporating these components. FAC at ¶ 27-28, 35-36, 43-44, 51-52, 59-60, 67-68. The FAC alleges that these components are especially made or adapted for use in infringing each Asserted Patent because they are not staple articles of commerce suitable for substantial non-infringing use and have no use apart from making or using the claimed inventions. *Id.* The

FAC further pleads that Zonoff is aware of the infringing uses to which these components are put. FAC at ¶¶ 27-28, 35-36, 43-44, 51-52, 59-60, and 67-68.

For the reasons discussed below, Icontrol has adequately pled claims for direct, inducement, and contributory infringement.

V. LEGAL STANDARDS

In reviewing a motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6), the Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff. ..." *In Re Bill of Lading Transm'n and Processing Sys. Patent Litig.*, 681 F.3d 1323, 1331 (Fed. Cir. 2012). A patentee need not "prove its case at the pleading stage," but must plead only '"enough factual matter' that, when taken as true, 'state[s] a claim to relief that is plausible on its face'." *Id.* at 1331 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Id.* at 1339. "The issue is not whether a plaintiff will ultimately prevail," (*Wilkerson v. New Media Tech. Carter Sch., Inc.*, 522 F.3d 315, 318 (3d Cir. 2008)), but whether the complaint gives the defendant fair notice of what the claim is and the grounds upon which it rests. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007).

As discussed below, the FAC exceeds these standards.

VI. ARGUMENT

Zonoff's Motion seeks to dismiss (a) Icontrol's indirect infringement claims (inducement and contributory); (b) Icontrol's infringement claims of any of the Asserted Patents' method claims; and (c) Icontrol's entire damages claim. Zonoff's motion also seeks a more definite statement of Icontrol's claims requiring Icontrol to identify which of the Asserted Patents' claims Icontrol contends Zonoff infringes. Each issue is addressed in turn and, for the reasons articulated below, the Motion should be denied.

A. The FAC Sufficiently Pleads Indirect Infringement.

Zonoff's motion to dismiss the FAC as to Icontrol's inducement and contributory infringement claims must fail.

1. The FAC Sufficiently Pleads Inducement Infringement

In order to state a claim for inducement infringement, a party must show that the "alleged infringer knowingly induced infringement and possessed specific intent to encourage another's direct infringement." *Clouding IP, LLC v. Rackspace Hosting, Inc. et al*, Case No. 12-cv-675-LPS (D.I. 179), *3 (D. Del. Feb. 6, 2014). A complaint sufficiently states a claim for inducement where it alleges, "defendants knew their customer's acts constituted infringement and specifically intended their customers to infringe the patent[s]-in-suit." *Bill of Lading,* 681 F.3d 1323, 1339, 1346; *see also Pragmatus AV, LLC v. Yahoo! Inc.*, No. 11-cv-902-LPS-CJB, 2012 U.S. Dist. LEXIS 161874, 36 (D. Del. Nov. 13, 2012) (citing same).

Similarly, this Court has previously held as sufficient a complaint that includes: "(1) factual allegations of direct infringement; (2) identification of the patents asserted and the defendants' products that allegedly practice the patented process; (3) allegations as to when each defendant became aware of the patents asserted against them; and (4) allegations that the defendants were aware of the patents at issue and, with this knowledge, intentionally and/or knowingly infringed the plaintiff's patent(s) and induced others to do so." *Finjan, Inc. v. McAfee, Inc., et. al.,* Case No. 10-cv-593-GMS (D.I. 244) at 2 n.3 (D. Del. Jan. 24, 2012).

Here, Zonoff is incorrect that the FAC lacks sufficient allegations as to Zonoff's inducement infringement of the Asserted Patents. On the contrary, the FAC is sufficient to state a claim for inducement under *Finjan*:

First, the FAC alleges that various third parties (including retailers such as Staples, service providers, consumer electronics OEMs, and system integrators) directly infringe the Asserted Patents. FAC at ¶¶ 26, 34, 42, 50, 58, and 66.

Second, the FAC identifies the Asserted Patents and each Zonoff product accused of infringing the Asserted Patents. FAC at ¶¶ 3-8 & Exs. 1-6 thereto.

Third, Icontrol alleges specific facts that Zonoff obtained pre-suit knowledge of the Asserted Patents in several ways, as outlined above.[3] FAC at ¶¶ 13-22.

Fourth, the FAC alleges that Zonoff, with full knowledge of the patents, intentionally and/or knowingly infringed its patent(s) and induced others to do so. FAC at ¶¶ 26, 34, 42, 50, 58, and 66. The FAC outlines specific facts establishing Zonoff's intent to induced others to infringe the Asserted Patents by: (1) advertising the infringing products and their infringing use; (2) establishing distribution channels for these infringing products in the United States; (3) drafting, distributing or making available datasheets, instructions, or manuals for the Accused Products to Zonoff's customers and prospective customers; and (4) providing technical support or other services for the Accused Products to Zonoff's customers and prospective customers. *Id*. The FAC alleges that Zonoff took these actions with full knowledge of the Asserted Patents and acted with the specific intent to induce one or more of these third parties to infringe the Asserted Patents. *Id.*

[3] Zonoff's claim that it cannot plausibly know about the Asserted Patents is particularly belied by the fact that, as alleged in the FAC, Zonoff's own patent applications cite to at least one of the Asserted Patents. *See* FAC at ¶ 19; *Lifescreen Sciences, LLC. V. C.R. Bard, Inc. and Bard Peripheral Vascular, Inc.*, C.A. No. 13-129-GMS, (D.I. 14) at 2 n.1 (D. Del. May 22, 2014) (holding that a defendant had sufficient knowledge of the patents-in-suit where, prior to the filing of the Complaint, the defendant cited to the "patents-in-suit as prior art during the prosecution of its own patents in the same field of technology").

This Court has previously considered language materially identical to the language used here in the FAC, and found it sufficient to state a claim for inducing infringement. *See e.g. Bear Creek Technologies, Inc. v. Vonage Holdings Corp. et al*, Case No. 11-cv-723-GMS (D.I. 22) at *3 (D. Del. Sep. 27, 2012); *and compare id.* (at Complaint, D.I. 1) at ¶¶ 38-47 *with* FAC at ¶¶ 26, 34, 42, 50, 58, and 66.

Accordingly, Zonoff's motion should be denied as to inducement infringement.

2. The FAC Sufficiently Pleads Contributory Infringement.

Zonoff's motion to dismiss Icontrol's contributory infringement claims should likewise be denied. Under 35 U.S.C. § 271(c), a patentee must demonstrate that an alleged contributory infringer has sold, offered to sell or imported into the United States a component of an infringing product knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use. *Walker Digital, LLC v. Facebook, Inc.*, 852 F. Supp. 2d 559, 566 (D. Del. 2012) (quotations omitted). The Federal Circuit has established a four-element test to prove contributory infringement: "1) that there is direct infringement, 2) that the accused infringer had knowledge of the patent, 3) that the component has no substantial noninfringing uses, and 4) that the component is a material part of the invention." *Fujitsu Ltd. v. Netgear Inc.*, 620 F.3d 1321, 1326 (Fed. Cir. 2010).

In the pleading context, Courts in this district have previously held that a plaintiff sufficiently stated a claim for indirect infringement where the complaint pleaded "[Defendant] has been aware, since at least April 11, 2011 or before, that its products accused of infringing including, but not limited to, the infringing apparatuses, are not staple articles or commodities of commerce suitable for substantial noninfringing use and are especially made and/or adapted for use in infringing the [patent-in-suit]." *Walker Digital*, 852 F. Supp. 2d at 567. The claims in the FAC are similarly drafted and should be likewise upheld.[4]

First, the FAC pleads that Zonoff's third party customers directly infringe by making, using, selling, or offering to sell products, devices, or systems that incorporate the Zonoff accused products as components. FAC at ¶¶ 27-28, 35-36, 43-44, 51-52, 59-60, 67-68.

Second, as discussed above the FAC sufficiently pleads that Zonoff had knowledge of the patents before, but at least as early as, the filing of the Original Complaint in this Action. *Id*. at ¶¶ 13-22.

Third, the FAC pleads that Zonoff knows that the products "are especially made and/or especially adapted for use in infringing the Asserted Patents," and further pleads that the products "are not staple articles of commerce suitable for non-infringing use, at least because the Accused Products and related components have no use apart from making and/or using the inventions as claimed", and that they are used only in conjunction with or as part of the claimed inventions. *Id.* at ¶¶ 27-28, 35-36, 43-44, 51-52, 59-60, 67-68.

Fourth, the FAC pleads that the products and their related components are material parts of the Asserted Patents. *Id*.

This Court and other courts in this district have held that this level of factual disclosure is sufficient to state a claim for contributory infringement. *Finjan,* Case No. 10-cv-593-GMS (D.I. 244) at 2 n.3; *Intellectual Ventures I,* Case No. 13-cv-474-SLR (D.I. 22) at *9; *and compare*

[4] As an initial matter, there is no dispute that Zonoff had the requisite knowledge for contributory infringement as of the filing of the Original Complaint in this action. Since Zonoff has continued to engage in the same conduct since then, this alone suffices to deny Zonoff's motion. *See Walker Digital* 852 F. Supp. 2d at 565 ("a defendant's receipt of the complaint and decision to continue its conduct despite the knowledge gleaned from the complaint satisfies the requirements of Global–Tech.").

Intellectual Ventures I (at Complaint, D.I. 1), ¶¶ 17-18, 25-26, 33-34, 41-42, 49-50, 57-58, and 65-66 *with* FAC at ¶¶ 27-28, 35-36, 43-44, 51-52, 59-60, 67-68.[5]

B. Zonoff's Motion To Dismiss All Method Claims Should Be Denied.

Zonoff's Motion next requests that the Court dismiss *every* method claim from *every* Asserted Patent. Zonoff argues that Icontrol was obligated to plead the elements of joint infringement because "where a complaint implicates a theory of joint infringement . . . a plaintiff must allege much more than merely the requirements of Form 18." Motion at 10. This argument is legally improper for a number of reasons.

First, Zonoff's Motion in this respect is premature. Courts in this district have routinely held that a plaintiff is not required to plead the elements of joint infringement, and that this is an issue best addressed during claim construction. For example, in *Pragmatus,* 2012 U.S. Dist. LEXIS 161874, at *21-22, Judge Stark reasoned that "[t]o the extent that a defendant asserts that a direct infringement claim should be dismissed because the claim terms-at-issue require joint infringement—and the resolution of that question depends in any meaningful way on the construction of those claim terms—the motion should typically be denied as premature. To engage in the claim construction process upon review of a motion to dismiss would be to go beyond the scope of a court's traditional gatekeeping role in reviewing such a motion; it would instead amount to a more in-depth evaluation of the merits of a plaintiff's case." *Id.*

[5] Zonoff's reliance on *Bonutti Skeletal Innovations LLC v. ConforMIS, Inc.*, Case No. 12-1109-GMS, 2013 U.S. Dist. LEXIS 164549, 1 (D. Del. Nov. 14, 2013), is misplaced. There, this Court dismissed claims of contributory infringement because the complaint failed to allege that the accused products "have no other substantial non-infringing uses." Here, on the other hand, Icontrol alleged that the Accused Products have no other substantial non-infringing uses because they are not staple articles of commerce, have no use apart from their infringing use, and are in fact used only in an infringing manner. FAC ¶27-28, 35-36, 43-44, 51-52, 59-60, 67-68.

Here, this issue should not be resolved by a motion to dismiss that does not identify any particular method claim and provides none of the considered analysis that would be available during a full *Markman* briefing process. In other words, Zonoff is making a claim construction argument that should be addressed during claim construction, not now.

Moreover, Zonoff's Motion on this issue asks the Court to draw improper inferences against Icontrol and the allegations in the FAC. Zonoff's Motion does not identify a single method claim that it contends requires joint infringement, and Zonoff's argument that "the performance of [said method claims] would be carried out by multiple parties" (Motion at 10) is conclusory, lacking any explanation about why or how any method claim in any Asserted Patent implicates a theory of joint infringement. Indeed, Zonoff fails to identify ***a single*** method claim that it contends requires joint infringement. Zonoff does not – and cannot – point to any portion of the FAC where joint infringement is implicated, because the FAC nowhere references "joint infringement" or "divided infringement". Zonoff is simply asking the Court to improperly ***presume*** that divided or joint infringement must occur whenever infringement of a method claim is alleged, and that Zonoff cannot practice the method claims on its own, as the FAC alleges.[6] Such an inappropriate inference violates the standards for a motion to dismiss, which require that factual inferences in a complaint be accepted as true – on its head. *In re Bill of Lading*, 681 F.3d

[6] Zonoff's reliance on *Bonutti* for this point is again inappropriate. *Bonutti* does not stand for the broad proposition that there is a presumption of joint or divided infringement when a method claim is alleged infringed. On the contrary, this Court in *Bonutti* granted a motion to dismiss on very case-specific grounds, holding there that the plaintiff failed to plausibly state a claim for direct infringement because the method claims of the Asserted Patents claimed "improved methods of performing surgery", and it was not plausible that the defendant, a device manufacturer, actually performed any surgeries. *Bonutti*, 2013 U.S. Dist. LEXIS 164549 at 2-3 n.4. Here, however, Zonoff has made no showing that it cannot plausibly perform any of the method claims itself.

at 1331. Accordingly, Zonoff's Motion should be denied as to this issue.[7]

C. Zonoff's Request To Strike Icontrol's Damages Claim Is Improper.

Zonoff argues, in direct contradiction to the statutory requirement that a patentee be awarded damages upon a finding of infringement, that Icontrol's entire claim for damages be stricken. This request is procedurally and legally improper.[8]

Zonoff's request is legally improper because Zonoff offers no authority justifying striking or dismissing from a pleading a patentee's claim for damages. If Icontrol prevails on its infringement claims, it will be entitled "in no event [to] less than a reasonable royalty." 35 U.S.C. § 284; *see also Apple Inc. v. Motorola, Inc.,* 757 F.3d 1286, 1327 (Fed. Cir. 2014); and *Dow Chemical Co*., 341 F.3d at 1381-82.

Zonoff's argument that Icontrol must affirmatively plead compliance with the marking statute (35 U.S.C. § 287) is misplaced. That statute addresses does not address pleading requirements, and does not impose an affirmative duty on a plaintiff to plead compliance. *See Sentry Protection Products, Inc. v. Eagle Mfg. Co.*, 400 F.3d 910, 918 (Fed. Cir. 2005) (holding that patentee did not waive claim for damages by failing to plead compliance with the marking statute). Further, the marking statute only applies to "[p]atentees, and persons making, offering for sale, or selling within the United States any patented article for or under them, or importing any patented article into the United States." *Id.* Where a patentee's products do not practice the patent, or where the claim is directed to a process or method, no marking or notice obligation is triggered. *See Texas Digital Systems, Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1220 (Fed. Cir. 2002) (marking requirement inapplicable "where there are no products to mark"); *Crown Packaging Tech., Inc. v. Rexam Bev. Can Co*., 559 F.3d 1308, 1316 (Fed. Cir. 2009) ("[t]he law is clear that the notice provisions of § 287 do not apply where the patent is directed to a process or method").[9] Moreover, § 287's text clarifies that its requirements, to the extent they apply at all, only apply to pre-suit damages because the "[f]iling of an action for infringement shall constitute such notice." 35 U.S.C. § 287(a). Whether the marking statute applies and was complied with are factual issues to be resolved at summary judgment or trial, not now.[10]

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[7] Zonoff's argument that it cannot plausibly practice every step of every method is further undermined by its failure to produce its core technical documents in accordance with Paragraph 4 of the Default Standard. *See* Exhibit B. Zonoff has refused to produce the very technical documents that would establish whether it practices the steps of the Asserted Patents' method claims on its own.

[8] Zonoff's request is procedurally improper because a motion to strike a portion of a pleading is permissible where the pleading contains "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Proc. 12(f). Zonoff does not claim that any portion of the FAC is redundant, immaterial, impertinent or scandalous, and does not cite any authority for the proposition that a motion to strike is a proper procedural vehicle to strike a party's damages claim.

[9] Zonoff's statement that "the patentee in an infringement case has the burden of 'pleading and proving at trial' that it complied with the [marking] requirement of 35 U.S.C. §287" is not wholly accurate. Motion at 11. Some courts place the burden first on the accused infringer to come forward with proof that the patentee sold or offered for sale a "patented product", and only upon that threshold showing does the burden shift to the patentee to show compliance with the marking statute. *See Laitram Corp. v. Hewlett-Packard Co., Inc.*, 806 F. Supp. 1294, 1296 (E.D. La. 1992); *Sealant Sys. Int'l, Inc. v. TEK Global S.R.L.*, No. 5:11-CV-00774-PSG, 2014 WL 1008183, at *1 (N.D. Cal. Mar. 7, 2014); *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2011 WL 5576228, at *1 (N.D. Cal. Nov. 15, 2011); *In re Katz Interactive Call Processing Patent Litig.*, 821 F. Supp. 2d 1135, 1158-59 (C.D. Cal. 2011); *Unova Inc. v. Hewlett-Packard*, 2006 WL 5434534, at *1 (C.D. Cal. Feb. 16, 2006).

[10] None of Zonoff's cited authority supports its arguments. *Dunlap v. Schoefeld*, 152 U.S. 244, 248 (1894), and *Maxwell v. Baker*, 86 F.3d 1098, 1111 (Fed. Cir. 1996), both addressed damages awards from a final judgment. Further, in *Jackson v. Intel Corp*, 2009 WL 2851742, *2 (N.D. Ill. Aug. 31, 2009), the court converted a Rule 12(b)(6) motion into a summary judgment motion and addressed the issue on the merits of the case (and found for reasons inapplicable here that the plaintiff was not entitled to damages because the patent-in-suit had already expired before the lawsuit was filed and the plaintiff was not entitled to pre-suit damages). None of these cases impose an obligation to plead compliance with the marking statute in a complaint or face "dismissal" of all damages claims (essentially dismissing plaintiff's entire case). Rather, each (particularly *Jackson*) supports the notion that compliance with the marking statute is a factual issue to be resolved on the merits.

D. Zonoff's Motion For A More Definite Statement Should Be Denied.

The Court should deny Zonoff's alternative motion for a more definite statement as to Icontrol's indirect infringement claims because the FAC is sufficiently definite to enable Zonoff to Answer the FAC, and because Zonoff refused to avail itself of this Court's default procedures for identifying and narrowing patent claims.

Federal Rule of Civil Procedure 12(e) allows a party to move for a more definite statement when a pleading is "so vague or ambiguous that the party cannot reasonably be required to frame a responsive pleading." *Xpoint Techs., Inc. v. Microsoft Corp.*, 730 F. Supp. 2d 349, 353 (D. Del. 2010); s*ee also Schaedler v. Reading Eagle Pub'n, Inc.,* 370 F.2d 795, 797 (3d Cir. 1967). Motions for a more definite statement are generally viewed with disfavor, particularly "where the information sought by the motion could easily be obtained by discovery." *CFMT, Inc. v. Yieldup Int'l Corp.*, No. 95-549-LON, 1996 U.S. Dist. LEXIS 22795, 1996 WL 33140642, at *1 (D. Del. Apr. 5, 1996).

At the pleading stage, a plaintiff is not required to identify which patent claims it is asserting. *Xpoint*, 730 F. Supp. 2d at 353; *see also McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007); *Bear Creek Technologies*, Case No. 11-cv-723-GMS (D.I. 22) at *3 n.5; and *Mark IV Indus. Corp. v. Transcore, L.P.*, Civ. No. 09-418-GMS, 2009 U.S. Dist. LEXIS 112069, 2009 WL 4828661 (D. Del. Dec. 2, 2009). Such a requirement is impractical because, at the time of the filing of the complaint, a plaintiff ordinarily has access only to public information and knowledge. *McZeal,* 501 F.3d at 1358. Therefore, as this Court observed in *In re Bear Creek*, "a plaintiff is not required to . . . identify which claims it is asserting . . . as these details are determined through discovery." Case No. 11-cv-723-GMS (D.I. 22) at *3 n.5 (*quoting Xpoint*, 730 F. Supp. at 353 and *McZeal*, 501 F.3d at 1358). Zonoff offers nothing to suggest that this case is unusual or worth departing from the Court's standard practices. Indeed, courts in this district routinely deny motions such as this, even where there are more patents with more claims at issue. *See, e.g.*, *Clouding IP LLC v. Amazon.com Inc.*, *et. al.*, Case No. 1-12-cv-00641-LPS (D.I. 11 (complaint) & 56 (order)) (D. Del. May 24, 2013) (**11 patents, 347 claims**); *IpLearn LLC v. Beeline Acquisition Corp.*, *et. al.*, Case No. 1-11-cv-00825-RGA (D.I. 15 (complaint) & 172 (order)) (D. Del. Jul. 2, 2012) (**9 patents, 511 claims**).

In light of the limited information available to a patentee about infringement at the start of a lawsuit, this District has chosen to provide a procedural mechanism whereby a patentee shall receive an early production of technical documents from a defendant and, in exchange, the patentee shall prepare preliminary infringement contentions specifically identifying the claims the patentee is asserting against the defendant. Paragraph 4 of the Court's Default Standard provides that

> a. Within 30 days after the Rule 16 Conference and for each defendant, the plaintiff shall specifically identify the accused products and the asserted patent(s) they allegedly infringe, and produce the file history for each asserted patent.
>
> b. Within 30 days after receipt of the above, each defendant shall produce to the plaintiff the core technical documents related to the accused product(s), including but not limited to operation manuals, product literature, schematics, and specifications.
>
> c. Within 30 days after receipt of the above, plaintiff shall produce to each defendant an initial claim chart relating each accused product to the asserted claims each product allegedly infringes.

Thus, the Court's procedures provide a mechanism for identifying specific asserted claims, but only after the defendant produces its "core technical documents." Zonoff's motion seeks to short-circuit these procedures by asking the Court to require patentees to provide their identification of asserted claims *before* the production of core technical documents, but Zonoff offers no justification warranting departure from the Default Standard.

Moreover, Zonoff brings this request for a more definite statement with unclean hands, having refused to avail itself of the Court's procedures for identifying and narrowing patent claims. As noted above, Icontrol served its Identification of Accused Products and Asserted Patents pursuant to Paragraph 4(a) of the Default Standard on November 7, 2014. *See* Exhibit A. In response, however, Zonoff declined to produce its core technical documents pursuant to Paragraph 4(b). *See* Exhibit B. Had Zonoff complied with its obligations, Icontrol would have diligently prepared its infringement contentions, including an identification of asserted claims, by January 7, 2015, pursuant to Paragraph 4(c). Zonoff's argument rings hollow in light of this hypocrisy.

Given that neither the Federal Circuit nor this Court have required a patentee to identify its asserted patent claims at this stage of the litigation, and further given Zonoff's failure to take advantage of the procedures available to identify and narrow the number of claims at issue, Zonoff's request for a more definite statement should be denied.[11]

VII. SHOULD THE COURT BE INCLINED TO GRANT DEFENDANT'S MOTION, THE COURT SHOULD GRANT PLAINTIFF LEAVE TO AMEND

For the reasons discussed above, the Court should deny Zonoff's Motion in its entirety. If, however, the Court grants the motion in whole or in part, Icontrol respectfully requests that the Court dismiss the allegations without prejudice and permit Icontrol leave to file an amended complaint. This Circuit applies a liberal approach to the amendment of pleadings so that "a particular claim will be decided on the merits rather than on technicalities." *Dole v. Arco Chem Co.*, 921 F.2d 484, 486-87 (3d Cir. 1990). Leave to amend should be granted absent a showing

[11] Even though it was not necessary to do so, Icontrol identified in the FAC at least one claim per Asserted Patent that Icontrol presently believes Zonoff infringes, in an attempt to resolve Zonoff's concerns without this Court's intervention. FAC at ¶¶ 25, 33, 41, 49, 57, and 65.

of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Forman v. Davis*, 371 U.S. 178, 182 (1962). As Zonoff has neither argued nor shown that an amendment would be improper, the Court should not dismiss with prejudice.

VIII. CONCLUSION

For the foregoing reasons, Icontrol requests the Court deny Zonoff's motion. In the alternative, should this Court decide that Zonoff's Motion to Dismiss has any basis, Icontrol requests leave to amend the Complaint.

Dated: December 19, 2014

/s/ Mary B. Matterer
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UNREPORTED/SLIP

OPINIONS AND ORDERS

TAB 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: BEAR CREEK TECHNOLOGIES INC. ('722 PATENT LITIGATION)	MDL No. 12-md-2344 (GMS)
BEAR CREEK TECHNOLOGIES, INC., Plaintiff, v. VONAGE HOLDINGS CORPORATION, VONAGE AMERICA, INC., and VONAGE MARKETING, L.L.C., Defendants.	C.A. No. 11-cv-723 (GMS)
BEAR CREEK TECHNOLOGIES, INC., Plaintiff, v. MEDIACOM COMMUNICATIONS CORPORATION and MEDIACOM BROADBAND, L.L.C., Defendants.	C.A. No. 11-cv-725 (GMS)
BEAR CREEK TECHNOLOGIES, INC., Plaintiff, v. 8X8, INC., Defendant.	C.A. No. 11-cv-728 (GMS)
BEAR CREEK TECHNOLOGIES, INC., Plaintiff, v. AT&T, INC.; SBC INTERNET SERVICES, INC. d/b/a AT&T INTERNET SERVICES; and AT&T TELEHOLDINGS, INC., Defendants.	C.A. No. 11-cv-729 (GMS)

ORDER

At Wilmington, this 27th day of September, 2012, having considered the plaintiff's complaints in the above-caption matters, the defendants' pending motions to dismiss[1] the plaintiff's direct, induced, contributory, and willful infringement claims in each,[2] the responses and replies thereto,[3] and the applicable law;

IT IS HEREBY ORDERED that the defendants' motions to dismiss the plaintiff's complaints are DENIED.[4] The court finds that the plaintiff's complaints sufficiently plead the required elements of its direct, induced, contributory, and willful infringement claims.[5]

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[1] The above-captioned defendants assert that Bear Creek Technologies, Inc. ("Bear Creek" or "the plaintiff") has failed to plead with sufficient specificity its direct, induced, contributory, and willful infringement causes of action and, therefore, that its complaints should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). Specifically, the defendants contend, in the main, that Bear Creek's: (1) direct infringement allegations, including its literal and doctrine of equivalents infringement claims, have not been sufficiently pled because Bear Creek states only "conclusory recitations of the elements of each respective claim," is "intentionally vague," and has not complied with Form 18 in meeting the notice pleading standards (*See, e.g.*, D.I. 13 at 7, 8 n.8); (2) inducement claims fail because they do not allege the "knowledge" element required for this cause of action, identify any third party that actually infringed the patent-in-suit, or allege affirmative action to induce such infringement (*id.* at 12); and (3) contributory infringement claims are insufficient because they do not allege that the defendants "knew that the combination for which [their] component was especially designed was both patented and infringing," thus failing to plead the "knowledge" requirement (*id.*). In addition, the defendants allege that the plaintiff has failed to sufficiently plead "willful infringement" and, therefore, cannot seek enhanced damages and attorney fees on this ground because the plaintiff does not assert that the defendants knew of the patent-in-suit or acted with specific intent. (D.I. 17 at 18-19.)

[2] *See* 11-cv-723 (D.I. 13); 11-cv-725 (D.I. 10); 11-cv-728 (D.I. 9); 11-cv-729 (D.I. 12).

[3] *See* 11-cv-723 (D.I. 14; D.I. 15; D.I. 16); 11-cv-725 (D.I. 11; D.I. 12; D.I. 13); 11-cv-728 (D.I. 10; D.I. 11; D.I. 12); 11-cv-729 (D.I. 13; D.I. 17; D.I. 18).

[4] *See* 11-cv-723 (D.I. 13); 11-cv-725 (D.I. 10); 11-cv-728 (D.I. 9); 11-cv-729 (D.I. 12).

[5] In consideration of the plaintiff's complaints, the parties' submissions, and the relevant law, the court concludes that the plaintiff's factual allegations are sufficient to successfully plead its direct, induced, contributory, and willful infringement claims. First, and with regard to the plaintiff's direct infringement claims, the court finds that it has adhered to the Form 18 standard, Rule 12(b)(6), and relevant case law. Specifically, the plaintiff's complaints meet the Form 18 requirements by: invoking jurisdiction under 28 U.S.C. § 1338(a); stating its ownership of the patent-in-suit; alleging that the defendants have infringed the patent by "making, selling, and using [the device] embodying the patent"; putting the defendants on notice as to the general scope/nature of their infringement; and demanding an injunction and damages. The defendants argue, in the main, the that plaintiff's complaints fail to put them on notice as to their alleged infringement because they do not detail which products allegedly infringe the patent-in-suit or specify the allegedly infringing parties. (*See, e.g.*, *id.* at 8 n.8.) The court disagrees. It is well-established that, "[w]hile it is not necessary to identify specific products,' it is necessary for a complaint at least to 'mimic Form 18 and identify a general category of products.'" *St. Clair Intellectual Prop.*

Consultants, Inc. v. Apple Inc., No. 10-00982-LPS, 2011 WL 4571812, at *2 (D. Del. Sept. 30, 2011) (citation omitted).

Here, the plaintiff's complaints note, in each, that "[e]ach of the [d]efendants . . . is infringing directly . . . at least claim 1 of the [patent-in-suit] by making, using, selling, offering for sale, operating, advertising[,] and/or marketing VoIP products, systems[,] or services." (*See, e.g.*, 11-cv-729, D.I. 1 at ¶ 26.) In addition, the complaints identify the trade names associated with several of the accused services. For instance, the complaints reference at least one allegedly infringing service for each defendant: the Vonage Phone service (11-cv-723); the Mediacom Phone service (11-cv-725); Hosted PBX, including 8x8Virtual Office and 8x8 Virtual Office Pro (11-cv-728); and U-verse Voice, AT&T IP Flexible Reach, and AT&T Business in a Box (11-cv-729). The complaints also generally reference the means by the defendants allegedly infringe the patent-in-suit. (*See, e.g.*, 11-cv-729, D.I. 1 at ¶¶ 14, 20, 26.) In addition, the plaintiff states that it provided the defendants with notice of their infringement by providing them with copies of the patent-in-suit in March 2011 and requests an injunction and damages as required. In view of the foregoing, the court concludes that the plaintiff's direct infringement claims meet the relevant pleading requirements.

Second, the court also finds the plaintiff's literal and doctrine of equivalents infringement claims to be sufficiently pled. The defendants assert that the plaintiff must meet the pleading requirements of *Twombly* and *Iqbal* and that mere compliance with Form 18 is insufficient to plead this cause of action. (*See, e.g.*, 11-cv-729, D.I. 13 at 9-12.) The court is not persuaded, however, by this argument. Rather, as the Federal Circuit has made clear, direct infringement—and, by extension, its doctrine of equivalents cause of action—must simply comply with the Form 18 elements to meet the *Twombly* pleading standard. *See McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007) (citation omitted). As discussed, the court finds this pleading standard met in these cases. Moreover, the court finds unavailing the defendants' arguments that the plaintiff has failed to provide meaningful notice of the claim limitations on which it relies for its doctrine of equivalents claim. Importantly, a "plaintiff is not required to specifically include each element of the asserted patent's claims or even identify which claims it is asserting; nor is it required to describe how the allegedly infringing products work," as these details are determined through discovery. *Xpoint Techs., Inc. v. Microsoft Corp.*, 730 F. Supp. 349, 353 (D. Del. 2010) (citation omitted); *see also McZeal*, 501 F.3d at 1358.

Third, and with respect to the plaintiff's induced and contributory infringement claims, the defendants contend that the plaintiff has insufficiently pled both causes of action by failing to allege facts related to the "knowledge" element of each claim. (*See, e.g.*, 11-cv-729, D.I. 13 at 12.) In addition, the defendants challenge the plaintiff's induced infringement claims as insufficient because the plaintiff fail to identify specific third parties that were being induced to infringe the plaintiff's patent-in-suit. However, the plaintiff does allege that the defendants have induced "one or more certain affiliates, one or more third parties, and plural subscribers . . . each regarding the VoIP Services subject to [the instant] claims," to infringe the patent-in-suit. (*See, e.g.*, 11-cv-729, D.I. 1 at ¶¶ 39-45.) Importantly, "identifying third parties who participated in allegedly infringing activities is a proper question for discovery." *Minkus Elec. Displays Sys. Inc. v. Adaptive Micro Sys. LLC*, Civ. No. 10-666-SLR, 2011 WL 941197, at *3 (D. Del. March 16, 2011) (citing *Mallinckrodt v. E-Z-EM Inc.*, 670 F. Supp. 2d 349, 354 (D. Del. 2009)). Thus, the court agrees with the plaintiff that it is not required to identify specific third parties that would be induced to infringe at this stage.

With regard to the "knowledge"/"intent" element, the plaintiff also correctly notes that it provided each of the defendants with a correct copy of the patent-in-suit in March 2011, such that the defendants knew of and, therefore, intended to infringe the asserted claims of the patent-in-suit as of that date. The court agrees that the plaintiff has satisfied the knowledge element of induced and contributory infringement by detailing in each complaint when it provided the defendants with copies of the patent-in-suit. Consequently, the court concludes that the plaintiff has sufficiently pled the requisite level of knowledge for it to proceed with its inducement and contributory infringement claims.

Finally, and for the reasons discussed herein in connection with the "knowledge" and/or "intent" element of these claims, the court finds that the plaintiff's complaints sufficiently plead the required elements of willful infringement to survive the instant motion. Specifically, the plaintiff's complaints detail: (1) that it filed suit against the above-captioned defendants in the Eastern District of Virginia in February 2011; (2) that it provided these defendants with copies of the '722 Patent by, at the latest, March 2011; and (3) the facts upon which its infringement claims are based. Moreover, the plaintiff asserts that the defendants were aware of the '722 Patent, in view of the

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above-cited dates, before it alleged willful infringement in these actions. In view of the plaintiff's complaints and the relevant law, the court concludes that the plaintiff has sufficiently alleged willful infringement at the pleadings stage. *See, e.g.*, *XPoint Techs., Inc. v. Microsoft Corp.*, 730 F. Supp. 2d 349, 356 (D. Del. 2010); *see also e.g.*, *In re Seagate Tech. LLC*, 497 F.3d 1360 (Fed. Cir. 2007); *Astrazeneca AB v. Apotex Corp.*, No. 01 Civ. 9351, M-21-81 (BSJ), 2010 WL 2541180, at *4 (S.D.N.Y. Jun. 9, 2010).

TAB 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FINJAN, INC., Plaintiff, v. MCAFEE, INC., SYMANTEC CORP., WEBROOT SOFTWARE, INC., WEBSENSE INC., and SOPHOS, INC., Defendants.	C.A. No. 10-cv-593 (GMS)

ORDER

At Wilmington, this 24th day of January, 2012, having considered the plaintiff's Amended Complaint (D.I. 69), the defendants'[1] pending motions to dismiss the plaintiff's indirect infringement claims and to stay the proceedings,[2] the responses and replies thereto (D.I. 25; D.I. 31; D.I. 35; D.I. 39; D.I. 40; D.I. 43), and the applicable law;

[1] The plaintiff, Finjan, Inc., brings suit against McAfee, Inc., Sophos, Inc., Symantec Corp., Webroot Software, Inc., and Websense, Inc. (D.I. 1; D.I. 69.) Only three defendants, however, filed the motions this Order addresses: McAfee, Inc. (D.I. 18), Webroot Software, Inc. (D.I. 24), and Websense, Inc. (D.I. 29). Consequently, for purposes of this Order, "defendants" refers to McAfee, Inc., Webroot Software, Inc., and Websense, Inc.

[2] The defendants assert that this case should be stayed pending a Federal Circuit appeal involving Finjan and Secure Computing Corp., a newly acquired McAfee company. (D.I. 18 at 1, 5-7; D.I. 24 at 2-3; D.I. 29 at 3-5.) Specifically, the parties note that *Finjan Software, Ltd. v. Secured Computing Corp., et al.*, C.A. No. 06-369 (GMS), 2009 U.S. Dist. LEXIS 72825 (Aug. 18, 2009), a case that was originally tried in this court and was argued on appeal before the Federal Circuit on June 6, 2010, includes an overlap in parties, patents, claim construction, and inventors. (D.I. 18 at 1.) The defendants contend that this overlap warrants a stay of the current proceedings until the Federal Circuit issues its opinion in the earlier Finjan action. (D.I. 18 at 5-7; D.I. 24 at 3; D.I. 29 at 1, 3-5.)

Since the filing of these motions, the Federal Circuit issued its opinion with respect to the *Finjan Software, Ltd. v. Secured Computing Corp.* appeal on November 4, 2010. *See Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197 (Fed. Cir. 2010). In light of this ruling, Websense, Inc., in a November 5, 2010 filing, withdrew its motion to stay the proceedings, but retained its motion to dismiss the plaintiff's indirect infringement claims. (D.I. 44.) Defendants McAfee, Inc. and Webroot Software, Inc. have not withdrawn their motions to stay the proceedings, however, and, in a November 16, 2010 letter to the court, McAfee asserted that a stay should be enacted pending resolution of its "request for rehearing by the panel and/or the appellate court en banc regarding important issues of patent law arising from the Federal Circuit's panel decision." (D.I. 47 at 1.) McAfee also contends that the stay would be useful pending the Federal Circuit's decision in *Tivo, Inc. v. EchoStar Corp.*, which will address issues related to contempt proceedings. (Id.)

IT IS HEREBY ORDERED that the defendants' motions to dismiss the plaintiff's indirect infringement claims and to stay the proceedings (D.I. 18; D.I. 24; D.I. 29) are DENIED. The court finds that the plaintiff's Amended Complaint (D.I. 69) sufficiently pleads the elements of an indirect infringement[3] claim and, further, that the defendants' motions to stay the proceedings are moot[4].

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[3] The defendants argue that the plaintiff failed to state a cause of action for its indirect infringement claims because: (1) it did not sufficiently allege the knowledge and intent elements required in the pleadings of such actions; and (2) neglected to allege that any third parties directly infringed the patents at issue. (D.I. 18 at 4-5; D.I. 24 at 1-2; D.I. 29 at 2). As the defendants correctly identify, a plaintiff pleading an indirect infringement action must demonstrate direct infringement and that "the defendant possessed the requisite knowledge or intent to be held vicariously liable." *See Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1272 (Fed. Cir. 2004). With respect to the latter element, "the requirement that the alleged infringer knew or should have known his actions would induce actual infringement includes the requirement that he or she knew of the patent." *See DSU Med. Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1304 (Fed. Cir. 2006) (en banc). Similarly, to adequately plead contributory infringement, a plaintiff must allege that the infringer "knew that the combination for which his component was especially designed was both patented and infringing." *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488 (1964).

It is well-established that, in evaluating a motion to dismiss, the court accepts as true all factual allegations contained in the complaint. *See, e.g., Calloway v. Green Tree Servicing, LLC*, 607 F. Supp. 2d 669, 673 (D. Del. 2009). A complaint does not need detailed factual allegations, however, a "plaintiff's obligation to provide the 'grounds' of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). To this end, the complaint must contain "enough facts to raise a reasonable expectation that discovery will reveal evidence," and, in the patent context, "a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend." *See id.* at 565 n.10; *see also McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007).

In assessing the defendants' motions, the court looks to the plaintiff's Amended Complaint and does not consider whether the factual allegations in its original complaint were sufficient to establish indirect infringement claims. (D.I. 1; D.I. 69.) In its Amended Complaint, the plaintiff includes, with respect to the indirect infringement claims asserted against each defendant: (1) factual allegations of direct infringement; (2) identification of the patents asserted and the defendants' products that allegedly practice the patented process; (3) allegations as to when each defendant became aware of the patents asserted against them; and (4) allegations that the defendants were aware of the patents at issue and, with this knowledge, intentionally and/or knowingly infringed the plaintiff's patent(s) and induced others to do so. (D.I. 69 at ¶¶ 27-47, 70-91, 91-102.) In light of the foregoing, the court concludes that the plaintiff's factual allegations are sufficient to establish its indirect infringement claims at the motion to dismiss stage.

[4] The court concludes that McAfee, Inc. and Webroot Software, Inc.'s motions to stay this proceeding are moot. As noted, the Federal Circuit issued its opinion in *Finjan, Inc. v. Secure Computing Corp.*, the case originally tried in this court and the case that the defendants assert overlaps the instant matter, on November 4, 2010. Moreover, the Federal Circuit denied McAfee, Inc.'s request for rehearing by the panel or a rehearing en banc on May 26, 2011, *Finjan, Inc. v. Secure Computing Corp.*, 2009-1576, -1594, 2011 U.S. App. LEXIS 13623, and issued its opinion in *Tivo, Inc. v. EchoStar Corp.* on April 20, 2011, *Tivo, Inc. v. EchoStar Corp. et al.*, 646 F.3d 869 (Fed. Cir. 2011). Consequently, as the Federal Circuit has issued opinions on all cases relevant to this action, McAfee, Inc. and Webroot Software, Inc.'s motion to stay are moot.

TAB 3

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

INTELLECTUAL VENTURES I LLC, and INTELLECTUAL VENTURES II LLC,	)	
Plaintiffs,	)	
v.	)	Civ. No. 13-474-SLR
RICOH COMPANY, LTD., RICOH AMERICAS CORPORATION, and RICOH ELECTRONICS, INC. INC.,	)	
Defendants.	)	

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MEMORANDUM OPINION

Dated: September 12, 2014
Wilmington, Delaware

ROBINSON, District Judge

I. INTRODUCTION

On March 25, 2013, plaintiffs Intellectual Ventures I, LLC ("IV I") and Intellectual Ventures II, LLC ("IV II") (collectively, "plaintiffs") filed a complaint alleging patent infringement against defendants Ricoh Company, Ltd. ("RCL"), Ricoh Americas Corporation ("RAC"), and Ricoh Electronics, Inc. ("REI") (collectively, "defendants"). (D.I. 1) Defendants filed a motion to dismiss the complaint for lack of personal jurisdiction over RCL and for failure to state a claim of joint infringement and contributory infringement. (D.I. 10)

IV I and IV II are limited liability companies organized and existing under the laws of the State of Delaware, with their principal place of business in Bellevue, Washington. (D.I. 1 at ¶¶ 1-2) RCL is a corporation organized under the laws of Japan, with a principal place of business in Tokyo, Japan. (D.I. 1 at ¶ 3) RAC is a wholly-owned and controlled subsidiary of RCL, and is a corporation organized under the laws of Delaware with a principal place of business in West Caldwell, New Jersey. (D.I. 1 at ¶ 4) REI is also a wholly-owned and controlled subsidiary of RCL, and is a corporation organized under the laws of California with a principal place of business in Tustin, California. (D.I.1 at ¶ 5)

Presently before the court is defendants' motion to dismiss for lack of personal jurisdiction and for failure to state a claim of joint infringement and contributory infringement. The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1338(a). For the reasons that follow, defendants' motion to dismiss for lack of personal jurisdiction over RCL is granted, and defendants' motion to dismiss for failure to state a claim of joint infringement and contributory infringement is denied.

II. STANDARD OF REVIEW

A. Personal Jurisdiction

Rule 12(b)(2) directs the court to dismiss a case when the court lacks personal jurisdiction over the defendant. Fed. R. Civ. P. 12(b)(2). When reviewing a motion to dismiss pursuant to Rule 12(b)(2), a court must accept as true all allegations of jurisdictional fact made by the plaintiff and resolve all factual disputes in the plaintiff's favor. *Traynor v. Liu*, 495 F. Supp. 2d 444, 448 (D. Del. 2007). Once a jurisdictional defense has been raised, the plaintiff bears the burden of establishing, with reasonable particularity, that sufficient minimum contacts have occurred between the defendant and the forum to support jurisdiction. *See Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir. 1987). To meet this burden, the plaintiff must produce "sworn affidavits or other competent evidence," since a Rule 12(b)(2) motion "requires resolution of factual issues outside the pleadings." *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 67 n.9 (3d Cir. 1984).

To establish personal jurisdiction, a plaintiff must produce facts sufficient to satisfy two requirements by a preponderance of the evidence, one statutory and one constitutional. *See id.* at 66; *Reach & Assocs. v. Dencer*, 269 F. Supp. 2d 497, 502 (D. Del. 2003). With respect to the statutory requirement, the court must determine whether there is a statutory basis for jurisdiction under the forum state's long-arm statute. *See Reach & Assocs.*, 269 F. Supp. 2d at 502. The constitutional basis requires the court to determine whether the exercise of jurisdiction comports with the defendant's right to due process. *See id.*; *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Pursuant to the relevant portions of Delaware's long-arm statute, 10 Del. C. § 3104(c)(1)-(4), a court may exercise personal jurisdiction over a defendant when the defendant or its agent:

> (1) Transacts any business or performs any character of work or service **in** the State;
> (2) Contracts to supply services or things **in** this State;
> (3) Causes tortious injury in the State by an act or omission **in** this State;
> (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct **in** the State or derives substantial revenue from services, or things used or consumed **in** the State.

10 Del. C. § 3104(c)(1)-(4) (emphasis added). With the exception of (c)(4), the long-arm statute requires a showing of specific jurisdiction. *See Shoemaker v. McConnell*, 556 F. Supp. 2d 351, 354, 355 (D. Del. 2008). Subsection (4) confers general jurisdiction, which requires a greater number of contacts, but allows the exercise of personal jurisdiction even when the claim is unrelated to the forum contacts. *See Applied Biosystems, Inc. v. Cruachem, Ltd.*, 772 F. Supp. 1458, 1466 (D. Del. 1991).

If defendant is found to be within the reach of the long-arm statute, the court then must analyze whether the exercise of personal jurisdiction comports with due process, to wit, whether plaintiff has demonstrated that defendant "purposefully avail[ed] itself of the privilege of conducting activities **within the forum State**," so that it should "reasonably anticipate being haled into court there." *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (citations omitted) (emphasis added). For the court to exercise specific personal jurisdiction consistent with due process, plaintiff's cause of action must have arisen from the defendant's activities in the forum State. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). For the court to exercise general personal jurisdiction consistent with due process, plaintiff's cause of action can be unrelated to defendant's activities in the forum State, so long as defendant has "continuous and systematic contacts with the forum state." *Applied Biosystems, Inc. v. Cruachem, Ltd.*, 772 F. Supp. 1458, 1470 (D. Del. 1991).

B. Contributory Infringement

In reviewing a motion filed under Federal Rule of Civil Procedure 12(b)(6), the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). A court may consider the pleadings, public record, orders, exhibits attached to the complaint, and documents incorporated into the complaint by reference. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384-85 n.2 (3d Cir. 1994). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (internal quotation marks omitted) (interpreting Fed. R. Civ. P. 8(a)). A complaint does not need detailed factual allegations; however, "a plaintiff's obligation to provide the 'grounds' of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 545 (alteration in original) (citation omitted). The "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Id.* Furthermore, "[w]hen there are well-ple[d] factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Such a determination is a context-specific task requiring the court "to draw on its judicial experience and common sense." *Id.*

In the context of a claim of contributory infringement under 35 U.S.C. § 271(c), a patentee "must, among other things, plead facts that allow an inference that the components sold or offered for sale [by the alleged infringer] have no substantial non-infringing uses," that is, uses that are " 'not unusual, far-fetched, illusory, impractical, occasional, aberrant, or experimental.' " *In re Bill of Lading*, 681 F.3d 1323, 1337 (Fed. Cir. 2012) (internal citation omitted). In *Walker Digital, LLC v. Facebook, Inc.*, 852 F.Supp.2d 559, 566-67 (D.Del.2012), this court concluded that the patentee sufficiently pled its allegations of contributory infringement when it asserted that defendant: "(1) had knowledge of the patent; (2) sold products especially made for infringing use; (3) had knowledge of the infringing use; (4) sold products with no substantial non-infringing use; and (5) directly infringed."

III. ANALYSIS

A. Personal Jurisdiction

When asserting a basis for jurisdiction over a defendant, plaintiffs are first tasked with demonstrating "a statutory basis for jurisdiction under [Delaware's] long-arm statute." *Boston Scientific Corp. V. Wall Cardiovascular Techs., LLC*, 647 F.Supp.2d 358, 364 (D.Del.2009). Plaintiffs assert two bases for personal jurisdiction under subsections (c)(1)-(4) of Delaware's long-arm statute: (1) general jurisdiction under section (c)(4) based on RCL's systematic presence in Delaware as the head of a "global network;" and (2) "dual jurisdiction" under sections (c)(1) and (c)(4) based on RCL's intentional injection of products into the stream of commerce using established business channels.[1] (D.I. 14 at 1-2)

1. General jurisdiction

In support of finding general jurisdiction over RCL, plaintiffs argue that "RCL is the head of a well-established distribution chain that results in Ricoh products being systematically sold and consumed in Delaware, from which RCL derives substantial revenues." (D.I. 14 at 7) Specifically, RCL sells various accused products including Ricoh-brand printers, scanners, copiers, and cameras to its subsidiary, REI, in Asia. (D.I. 11 at 4) REI then imports these products into the United States where title eventually passes to another RCL subsidiary, RAC. (D.I. 11 at 9)

Earlier this year, the Supreme Court addressed the question of "whether a foreign corporation may be subjected to a court's general jurisdiction based on contacts of its in-state subsidiary." *Daimler AG v. Bauman*, 11-965, 2014 WL 113486, at *10 (Jan. 14, 2014). The Court rejected as "unacceptably grasping" an approach to finding general jurisdiction wherein a corporation merely "engages in a substantial, continuous, and systematic course of business [in the forum state]." Id. at *11. The Court further rejected the Ninth Circuit's agency theory, which subjects a foreign corporation to jurisdiction "wherever they have an in-state subsidiary or affiliate." Id. at *10.

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[1] Because there is no indication that plaintiffs intended to assert an "agency" theory as the basis for jurisdiction, the court will not address the merits of defendants' arguments on this subject.

Here, plaintiffs do not contest that RAC "has not undertaken any direct acts in Delaware, does not directly sell products in the United States, is not registered to do business in Delaware, has no offices or registered agents in Delaware, and has no control or agency relationship with its U.S.-based subsidiaries, Defendants RAC and REI." (D.I. 14 at 10) In light of the Supreme Court's holding in *Daimler*, plaintiffs' attempt to argue that general jurisdiction is appropriate based on RAC's relationship with its wholly-owned subsidiaries is unavailing.[2]

2. Stream of commerce and dual jurisdiction

Plaintiffs argue that RCL satisfies both prongs of Delaware's dual jurisdiction theory, based on the contention that: (1) RCL "established distribution channels in the United States for distribution of [accused] products"; and (2) RCL maintains a website that provides information about how to purchase Ricoh products and permits direct sales inquiries.[3] (D.I. 17 at 14)

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[2] The court is unpersuaded by plaintiffs' argument that the act of injecting products into the stream of commerce is enough to establish general jurisdiction over RCL when considered in concert with the actions of RCL's subsidiaries. (D.I. 14 at 12)

[3] RCL denies that the website permits direct online sales inquiries or provides purchase information. (D.I. 17 at 4)

There is no evidence in the record that RCL has the requisite intent to sell Ricoh products in Delaware. RCL transfers title of the accused products to REI in Japan, prior to importation. Regardless of the precise functionality of the RCL website, there is no indication that Ricoh products can be directly purchased through it. Altogether, these facts as alleged by plaintiffs are insufficient to support a finding of dual jurisdiction. Because plaintiffs have not established personal jurisdiction over RCL under Delaware's long-arm statute, the court need not address whether the exertion of such jurisdiction satisfies the Due Process Clause.

The court also declines to permit jurisdictional discovery. Such discovery is appropriate only if a plaintiff "presents factual allegations that suggest 'with reasonable particularity' the possible existence of the requisite 'contacts between [the party] and the forum state.' " *Toys "R" Us, Inc. V. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003). Given that RCL is a Japanese corporation doing business solely in Asia with its subsidiaries, plaintiffs have not presented sufficient allegations to justify further discovery. Defendants' motion to dismiss RCL for lack of personal jurisdiction is granted.

B. Contributory Infringement[4]

Plaintiffs allege that for each of seven patents,[5] "Ricoh has contributed and continues to contribute to the infringement of the [patents-in-suit] pursuant to 35 U.S.C.

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[4] As plaintiffs aver that they have not alleged joint infringement at this time, the court does not concern itself with defendants' motion in this regard.

[5] The patents-in-suit are United States Patent Nos. 5,444,728, 6,130,761, 6,435,686, RE43,086, 5,712,870, 6,754,195, and 6,977,944.

§ 271(c) by selling and offering to sell within the United States, and/or importing into the United States the [patented] Accused Instrumentalities and components thereof to its subsidiaries, customers and resellers, and other third parties." (D.I. 1 at ¶ 17) Plaintiffs' claims of contributory infringement are facially plausible and provide defendants with adequate notice to satisfy the pleading requirements of *Twombly* and *Iqbal.* Plaintiffs' complaint appropriately asserts that defendants had knowledge of its infringement "at least through the filing and/or service of this Complaint." (D.I. 1 at ¶ 13); *Walker Digital LLC v. Facebook, Inc.*, 852 F.Supp.2d 559, 565 (D.Del.2012) (explaining that "defendant's receipt of the complaint and decision to continue its conduct despite the knowledge gleaned from the complaint satisfies the requirements of *Global-Tech*").

For each patent-in-suit, plaintiffs describe the accused products and include a representative product. For example, plaintiffs describe a laser driver circuit with a bypass switch, and assert that "these components and apparatuses are not staple articles of commerce suitable for substantial non-infringing use . . . ." (D.I. 1 at ¶ 18) Given Form 18's liberal pleading requirements which allow plaintiffs to plead that entire product categories infringe the patent-in-suit, plaintiffs' identification of particular products satisfies the requirement that some part or product contributorily infringe. *See generally FotoMedia Techs., LLC v. AOL, LLC*, Civ. No. 07-255, 2008 WL 4135906, at *2 (E.D.Tex. Aug. 29, 2008).

IV. CONCLUSION

For the reasons discussed above, plaintiffs' motion to dismiss for lack of personal jurisdiction over RCL is granted and defendants' motion to dismiss plaintiffs' claims for joint and contributory infringement is denied.

An appropriate order shall issue.

TAB 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LIFESCREEN SCIENCES LLC, Plaintiff, v. C.R. BARD, INC. and BARD PERIPHERAL VASCULAR, INC., Defendants.	)	C.A. No. 13-129-GMS

ORDER

Presently before the court in the above captioned matter is C.R. Bard, Inc.'s and Bard Peripheral Vascular, Inc.'s (collectively, "Bard") Rule 12(b)(6) Partial Motion to Dismiss, (D.I. 7), the plaintiff's claims for induced, contributory, and willful infringement. In reviewing a motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6), the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff…." *In Re Bill of Lading Transm'n and Processing Sys. Patent Litig.*, 681 F.3d 1323, 1331 (Fed. Cir. 2012). In order to overcome a motion to dismiss, the plaintiff's complaint must plead "'enough factual matter' that, when taken as true, 'states a claim to relief that is plausible on its face.'" *Id.* at 1331 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

After considering the parties' positions as set forth in their papers, the complaint, as well as the applicable law, the court finds that the plaintiff has pled sufficient facts for induced, contributory, and willful infringement.[1] Accordingly, the court denies the defendants' partial motion to dismiss.

IT IS HEREBY ORDERED THAT Bard's Partial Motion to Dismiss (D.I. 7) is DENIED.

Dated: May 22, 2014

CHIEF, UNITED STATES DISTRICT JUDGE

[1] The plaintiff avers in its Complaint that: Bard directly infringes the patents-in-suit by, *inter alia,* making, using, selling and offering for sale its Meridian® Vena Cava filter; Bard knowingly induced and contributed to the direct infringement of the patents-in-suit by providing its Meridian® Vena Cava filter- which is not a staple of commerce that is suitable for substantial non-infringing use - along with promotional and instructional materials to its customers and end-users; Bard's customers and end-users directly infringe the patents-in-suit by, *inter alia,* using the infringing medical devices; Bard had knowledge of the patents-in-suit, at least, upon service of the Complaint in this action, but also prior to the filing of the Complaint through citation to patents-in-suit as prior art during the prosecution of its own patents in the same field of technology; and Bard committed willful infringement by continuing to infringe the patents-in-suit despite knowledge and notice. (*See* D.I. 1; D.I. 11 at 3.)